

**Before the
SURFACE TRANSPORTATION BOARD**

**Canadian Pacific Railway Company, et al – Control -
Dakota, Minnesota & Eastern Railroad Corp., et al**

Finance Docket No 35081

Rebuttal in Support of Request for Conditions And Other Opposition

Pursuant to the Board's Decision, served December 27, 2007, Mayo Clinic, by and through its undersigned counsel, offers the following Requests for Conditions and Other Opposition in response to the Reply Comments of the United States Department of Transportation ("DOT"), filed April 18, 2008, and the "Applicants' Response to Comments and Requests for Conditions and Rebuttal in Support of Application," filed April 18, 2008. Mayo Clinic is further entitled to make this Rebuttal In Support of Request for Conditions because Applicants' Response was an evidentiary submission which, for the first time, confirmed Mayo Clinic's position that significant volumes of hazardous materials, including ethanol, will be transported through Rochester, Minnesota in close proximity to Mayo Clinic. Unless Mayo Clinic is permitted to make this Rebuttal, it will have no opportunity to respond to the new evidence submitted by Applicants in their Response. Fundamental fairness dictates that Mayo Clinic be allowed to address the new evidence, which is plainly inconsistent with Applicants' prior submissions.

There are now two major issues upon which the Canadian Pacific Railroad ("CP") and the Dakota Minnesota & Eastern Road ("DM&E") (hereinafter jointly referred to as

"Applicants") have made critical initial representations that are inconsistent with subsequent representations made to the Board and sworn testimony in federal court

First, information submitted by Applicants for the first time in their April 18 Response makes it clear that the prior representations by the Applicants are not consistent with their current non-public, sealed representations regarding the nature and extent of the transportation of hazardous materials through Rochester, Minnesota that will be the result of the proposed transaction. "Highly Confidential" evidence, first introduced by the Applicants in the course of their April 18 Response, simply cannot be reconciled with prior testimony in Applicants' "Response to Environmental Comments" (CPR-12) filed February 19, 2008. Equally important, the new evidence undermines and discredits the Board's critical reliance, in its Decision No. 9, served April 3, 2008, on the Applicants' statement that:

all of the anticipated growth in ethanol traffic will either move west (to interchange with BNSF) or via IC&E's lines to the Chicago gateway. Thus, according to Applicants, none of that traffic is expected to be transported through Rochester to the end of DM&E's existing all at Minnesota City, near Winona.

That same discredited evidence also underlies DOT's analysis of Mayo Clinic's request for conditions that would, among other things, require the immediate installation of multiple grade-separated crossings and wayside detectors, rather than awaiting the movement of coal from the Powder River Basin ("PRB")

Second, Applicants' claims that they have not decided to build the PRB extension cannot be reconciled with the sworn testimony in Federal court proceedings that flatly contradict these claims.

In addition, we have responded to the Applicant's distorted analysis of Mayo Clinic's safety concerns and to the need for the Board to exercise its statutory responsibility in implementing rail safety. Contrary to the Applicants' positions, Mayo Clinic is not advocating

the preemption by the Board of the orderly, well-established processes of the Federal Railroad Administration ("FRA"), the Federal Highway Administration ("FHWA") or the Pipeline and Hazardous Materials Safety Administration ("PHMSA"). Instead, Mayo Clinic is merely asking the Board to exercise its safety jurisdiction consistent with the National Transportation Policy

We have also responded to Applicants' extremely short-sighted approach to Mayo Clinic's requested conditions. Under any rational risk management analysis, the conditions requested by Mayo Clinic are reasonable. Moreover, they are consistent with the policies adopted by the Association of American Railroads in OT-55.

Finally, and most importantly, assuming that the PRB extension is not built, the conditions the Board imposed in the *PRB Construction* case are for naught, thereby leaving Mayo Clinic with none of the protections offered by those conditions even though the instant proceeding will result in a substantial increase in the number of carloads of hazardous materials moving within a few hundred feet of its facilities.

1. Applicants' Response Cannot Be Reconciled With New Evidence Regarding A Significant Increase In Projected Movements Of Hazardous Materials Through Rochester.

Changed or inconsistent initial representations by Applicants to the Board concerning the volume and routing of hazardous materials should be carefully examined. In its April 3 decision, (Decision No. 9 at 7), the Board noted that

in their Response, Applicants specifically state that all of the anticipated growth in ethanol traffic will either move west (to interchange with BNSF) or via IC&E's lines to the Chicago gateway."

Similarly, DOT noted (DOT-4 at 4) that

it bears repeating that the Applicants have projected only a small additional increment in traffic as a result of their consolidation, including hazardous materials, and they deny that the organic

**growth in ethanol traffic will flow through Rochester in any event
CPR-12/DME-12 at 10-11**

**In their Response to Environmental Comments (CPR-12 DME 12) the Applicants
stridently accused Mayo Clinic of offering “nothing but speculation and mischaracterization to
create the fiction of huge quantities of ‘unsafe’ shipments of ethanol through Rochester.”
(Response at 11). They also asserted (*id.* at 10) that:**

**Mayo misconstrues or ignores the substantial traffic data
Applicants submitted in support of the Application. These data
show that not only is there no projected substantial increase in
traffic through Rochester, but also the Board’s environmental
thresholds will not be exceeded even accounting for both the traffic
increases projected as a result of the proposed transaction and
“organic” growth in Applicants’ traffic that is likely to occur
whether or not the proposed transaction takes place. Neither
Mayo, nor any other commenter, presents any information or data
to show that Applicants’ projections are faulty or incorrect, and no
EIS is required now to assess the impacts from the small volumes
of increased traffic resulting from the proposed transaction.**

Applicants further contended (*id.* at 11, emphasis in original) that

**Mayo not only mischaracterizes the figures presented in the
Operating Plan and Mr. Foot’s Verified Statement, it also
mistakenly assumes that all this traffic, including anticipated
growth in ethanol shipments, will be routed over DM&E’s line
through Rochester, MN. See Mayo Comments at 5-6. In fact, all
of the anticipated organic growth in ethanol traffic described by
Mr. Foot will move either west (to interchanges with BNSF) or via
IC&E’s lines to the Chicago gateway. None of that traffic will be
transported through Rochester over DM&E’s lines.**

**Even if those comments may have been true with respect to the current DME system, the
Reply Verified Statements of Lynn A. Anderson and Vern Graham factually contradict and are
not consistent with the Applicants’ prior statements and confirm Mayo Clinic’s consistent
position that a substantial number of carloads of ethanol *will* move through Rochester on their
way to Chicago following the upgrading of the track through Rochester. As a result, any
conclusion that may have been based on Applicants’ prior statements and representations must**

be reconsidered. The Board should recognize that the record now shows that once Applicants "are confident that track conditions are adequate to ensure safe movement" of ethanol and other hazardous materials over the "DM&E track from Owatonna through Rochester, Minnesota," they will use that routing for the substantial increase in the projected number of carloads of ethanol Reply V.S. Graham at 6 See also, Reply V S. Anderson at 10. In short, Mayo Clinic's safety concerns have been directly on target throughout this proceeding.

The planned routing of ethanol and other hazardous materials through Rochester must be reevaluated in light of two related factors. Applicants have now confirmed that track work in the Rochester area has been scheduled for completion in 2009. Upon completion, "the track through Rochester will be FRA Class 3." Reply V.S. Graham at 13. That positive factor must be viewed in light of the further fact that once Class 3 status is achieved, a substantial increase in the transportation of hazardous material traffic will be moved over the DM&E line between Owatonna and Minnesota City

Applicants "[

]" Reply V S. Graham at 6 The same projected increase in ethanol volume is cited in Anderson's Reply V.S. at 10 In 2010, on average there will be more than [] of ethanol shipped every day of the year via the DM&E line.

This newly disclosed information compels a reevaluation of the Applicants' prior projections upon which both DOT and the Board relied when they assessed Mayo Clinic's proposed conditions.

Given the carefully drawn distinction that Applicants have made repeatedly between movements on the “current DME system” and movements on DM&E (not including IC&E), there is no doubt that there will be a substantial increase ([
]) in the number of carloads of hazardous materials, primarily ethanol, that will move over the DM&E track from Owatonna through Rochester, Minnesota on their way to Chicago. As Graham has explained (Reply V S. Graham at 5):

On the current DME system and under its existing operating plan, [
]

Whether, when, and how much ethanol traffic will be re-routed in this manner will depend on a variety of factors, including but not limited to those described above and operating plans, operating efficiency, track conditions, and commercial and market considerations

Plainly, once CP decides that the “DM&E track from Owatonna through Rochester, Minnesota is capable of safely handling hazardous material traffic”¹ (which is likely to occur as early as 2009 and no later than 2010 immediately following the rehabilitation and upgrading of “the line from Owatonna through Rochester to FRA Class 3 track”), a significant number of carloads of ethanol will be re-routed over that line.² Hence, DOT’s comment (DOT-4 at 4) that “[t]he merger itself thus appears to present little new threat to the Rochester area” is no longer valid.

¹ V S. Graham at 6

² “Improvements scheduled to be completed in 2009 (and which DME plans to begin in 2008) will bring the DM&E track from Owatonna through and beyond Rochester up to Class 3 standards, enhancing the safety of that line and allowing greater train velocity.” Applicants’ Response at 76

Based on historic shipment data, it can be assumed that CP will continue to ship carloads of anhydrous ammonia through Rochester.³ DOT's Pipeline and Hazardous Materials Safety Administration ("PHMSA") in its Interim Final Rule noted that "[t]he safety and security risks posed by shipments of . . . PHH materials are significant even if a rail carrier only transports a single carload." *Hazardous Materials Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments* (73 Fed. Reg. 20752, 20760, April 16, 2008). Consistent with PHMSA's finding, even the limited quantities previously transported by DM&E unquestionably pose safety and security risks.

Furthermore, because DM&E currently lacks the financial wherewithal to accomplish the upgrading of its track to Class 3 status without the infusion of \$300 million of CP funds, the re-routing of the ethanol (with its attendant potential for inflicting devastating harm) can only be attributed to CP's acquisition of DM&E and *not* to some pre-existing condition. As a result, the imposition of conditions to address the potential harm associated with the projected, substantial increase in the transportation of hazardous materials in close proximity to Mayo Clinic would be consistent with the Board's policy of imposing conditions on its approval of a proposed transaction in order to address harms or conditions that are caused by the transaction. *Canadian Nat'l Ry. Co. and Grand Trunk Corp. – Control – Duluth, Missabe and Iron Range Ry. Co., Bessemer and Lake Erie R.R. Co., and the Pittsburgh and Conneaut Dock Co.* ("CN/DMIR"), F.D. No. 34424, 2004 WL 761305, at *9, 13

³ DM&E shipped the following carloads anhydrous ammonia (which is classified as Poisonous by Inhalation (PIH) hazardous material): 2004 – 6 carloads, 2005 – 5 carloads, 2006 – 4 carloads, 2007 – 3 carloads. The increase in the production of corn-based ethanol will almost certainly result in increased transportation of anhydrous ammonia, a toxic by inhalation hazardous material, which is the most widely used form of nitrogen fertilizer in the Corn Belt. See Testimony of Dan Weber, May 1, 2008 Hearing of the House Committee on Small Business, U.S. House of Representatives on "Rail Transportation Access for Small Business and Family Farms," at 3, citing "Soil Ph Effects on Nitrification of All-Applied Anhydrous Ammonia," Soil Sci. Soc. Am. J. 68: 545-551 (2004), available at <http://soilsjournal.org/cgi/content/full/68/2/545>.

2. PRB Extension: The Representations Cannot Be Reconciled.

Throughout the Board's consideration of CP's pending application to acquire ownership and control of DM&E, both CP and DM&E have sought to avoid consideration of the issue of when the CP will decide to construct a line of railroad into the PRB. Beginning with the initial Verified Statements of Fred Green, CP's President and Chief Executive Officer, and Kevin V. Schieffer, DM&E's President and CEO, which were filed with the Board in early October, 2007, CP and DM&E have repeatedly emphasized that CP will make available \$300 million of capital to allow DM&E to repair and upgrade its line. At the same time, they have downplayed CP's role in the development of the PRB project in order to claim that CP has not yet made a decision to build the PRB line. For instance, at pages 5-6 of his October 3, 2007 Verified Statement, Green testified that.

DME has not completed the process of acquiring (through purchase, easement or condemnation proceedings) all of the right-of-way it needs to build the proposed PRB line. Nor has it executed agreements with PRB mines to connect with, and to operate over, their loading tracks and facilities. Most importantly, DME has not secured sufficient commitments from prospective coal shippers to route their traffic over the proposed PRB line to justify the very large investment required to build it. Finally, to date, DME has not been successful in arranging financing for the project.

Green also testified (*id.* at 6) that.

[A]s a Class I railroad, CPR possesses far greater financial capability than DME to undertake the PRB line project. In addition, CPR's expertise in designing and constructing rail lines, and its experience in conducting coal hauling operations, would facilitate construction and operation of the proposed PRB line.

Similar themes were expressed by Schieffer at pp. 3-4 of his Verified Statement dated September 28, 2007.

DM&E has dedicated substantial resources to secure authorization to construct a new 280-mile extension serving the PRB. However,

before the PRB project is initiated, we must achieve a number of significant threshold requirements. Those basic requirements have not changed as a result of this transaction, and generally relate to marketing and construction related issues. CPR has not yet made a decision to build the PRB line, and any such decision will depend upon satisfactory completion of the tasks that DM&E is pursuing today

Since that time, neither CP nor DM&E have deviated from those basic representations in the instant proceeding that is pending before the Board. As a result, the Board and the parties have been left with the impression that DM&E alone is pressing forward with its attempt to obtain the right-of-way, secure contracts with coal shippers and finalize the developmental plans for the new railroad. As it now appears, while continuing to claim that it has not yet made a decision to build the PRB line, CP has been actively funding DM&E's continued work on the project with the goal of beginning construction in early 2009 following the Board's anticipated approval of its application to acquire the DME system.

Based on newly discovered facts, we suggest that it would be prudent for the Board to take a fresh look at those representations. In particular, the Board's attention is invited to sworn testimony addressed to the United States District Court for the District of Wyoming in a proceeding entitled *Dakota, Minnesota & Eastern Railroad Corporation, et al v 399 591 Acres of Land, More or Less, Located in Campbell and Weston County, State of Wyoming*. This is an eminent domain proceeding in which DM&E is attempting to force the sale to it of privately held land to be used as the right-of-way for its new line.

In stark contrast to the positions taken before the Board, Kevin Schieffer, Randy H. Henke, Vice President of Powder River Basin Design, and John Brooks, DM&E's Assistant Vice President of Marketing, have represented to the Court that not only has CP "decided to pursue the project," but CP is actively participating in the PRB project at this time so as to be able to

begin construction early in early 2009. *See* Transcript at pp. 208, 236-237, 101 (Attachment A hereto).

Mr. Schieffer was supposed to attend the hearing but, for whatever reason, failed to appear. As a result, attorneys for the landowners were forced to introduce deposition testimony.

At page 208 of the trial transcript, the following exchange was read into the record:

Q. And you don't dispute that CP has not made a decision as we sit here today about whether to build out into the Powder or not?

A. I think they clearly have decided to pursue the project. That's why we're continuing with the development effort. I distinguished the development effort from the construction effort. And if you understand that distinction, that's as clear as I think I can make it. But this is for me speaking for CP. You're asking about my opinion. That's a – really a question for CP.

At page 236-237 of the trial transcript, the following exchanges between Schieffer and the examining attorney were also read into the court record:

Q. But there is no CPR participation in the project at this time, is there?

A. Of course there is.

Q. Well, they've agree to purchase DM&E, but they're not participating in the project.

A. Of course they are.

Q. How?

A. Well, as owners of the company

Q. Well, they're not owners yet.

A. Yes, they are.

Q. The trustee is the owner

A. No, they are owners of the companies

Q. Okay. Are they funding? Are they sending you money to do stuff?

A As owners of the company, it is their money that is [Transcript p. 237] being spent on it. Absolutely. This isn't the trustee's money. The trustee is holding everything – he's got obligation to DM&E and to CP as the owner. But I'm using CP in a generic example as I would use DM&E in a generic example of all of the affiliates . Yeah CP is very involved in it.

Q. Okay. So question to you was. I asked you, there is no CPR participation in the PRB project at this time. And your answer was: Well, we're spending DM&E money that otherwise might go to CPR later, right?

A My answer was unequivocally that it's not correct CP is involved in it, period.

Q And do you agree with the statement that CP has not yet made a decision about whether it will build into the Powder or not? (sic)

A In terms of a final decision to commit construction, I would say most definitely they haven't.

* * *

Q. I'm not sure what you were talking about in your answer. You said in terms of a final decision to construct, no. But it left the possibility there may have been other [Transcript-p. 238] decisions by CP. I'm just trying to clarify.

A. . . In terms of the ongoing development and so forth, we're going full steam ahead on that. And if they weren't planning on or having an expectation or an assumption that the PRB was going to happen, it would be foolish to consider or advance development efforts. So that would be something that would fit in that category. It's a developmental – it's a development budget versus a construction point of no return kind of decision, commitment of the entire construction amount if that helps you.

The witnesses also documented CP's active involvement and participation in the PRB project by testifying that, since October 2007, CP, *not* DM&E, has been funding the developmental effort to the tune of \$3.5 to \$4 million per month (Transcript at pp. 112, 115, 125). CP's efforts include having between 150 to 200 people currently working on the design of

the railroad project. (Transcript at 100, 101) This equates to an expenditure of 25,000 to 30,000 hours on a monthly basis. To repeat Schieffer's apt summarization of the situation.

In terms of ongoing development and so forth, we're going full steam ahead on that. And if [CP] weren't planning on or having an expectation or an assumption that the PRB was going to happen, it would be foolish to consider or advance development efforts

It also appears from the transcript of the Wyoming case that, whereas the Board continues to rely on ten-year-old evidence presented by hired consultants to support DM&E's economic modeling in its original application, DM&E has "shoved" that evidence aside in favor of its "own reality check" (Transcript at 153, 193).

We respectfully urge the Board take a fresh look and compare DM&E's testimony in the pending eminent domain cases with the inconsistent testimony that has been presented in CP's application that is pending before the Board. Plainly, the "sworn" evidence in the Acquisition case that CP has not made a decision to pursue the PRB project cannot be reconciled with the contrary evidence presented in the Wyoming proceeding that the construction starting date is early 2009 – a date that is "well known to CP" (Transcript at 101) – and that DM&E, utilizing CP's funds, has been "charged with getting this project ready to be built in early 2009." (Transcript at 115). Indeed, it is telling that Applicants, while stating that "DM&E's actions to secure land in South Dakota and Wyoming simply reflect its attempt to satisfy [one of the] preconditions that must be satisfied before the PRB project can be constructed,"⁴ never bothered to inform the Board or the parties that it was actively funding the developmental plans for the PRB project, even though that funding is a material fact that should have been disclosed

⁴ Response to Environmental Comments (CPR-12 DME-12) at 12

3. Applicants Have Distorted Mayo Clinic's Safety Concerns And Disregarded The Board's Statutory Mandate To Enforce Railroad Safety.

Applicants claim (Response at 70) that because most of Mayo Clinic's "requested conditions concern matters at the heart of the jurisdiction, responsibility, and expertise of FRA, FHWA and other transportation safety agencies, such as highway-rail grade crossing protection and signaling, safety devices, track safety standards, maximum speeds for track, and operating practices," Mayo Clinic "is effectively asking the Board to preempt [the] orderly, well-established processes" of those agencies. They further contend (*id.* at 71) that if the Board were to address Mayo Clinic's safety concerns, that it would "be unwarranted and inconsistent with the statutory and regulatory schemes governing grade crossings and other aspects of railroad safety."⁵

Applicants' claims are without merit. As they acknowledge (Response at 80), Mayo Clinic's "first and sixth requested conditions – requiring Applicants to install multiple grade separated crossings and requiring grade crossing protection devices that will allow whistle-free rail operations – overlap with Conditions 1A, 1B, 2, 121 and 123 that the Board imposed in the *DM&E PRB Construction* case." Given the Board's prior action, it is plainly evident that Mayo Clinic is not asking the Board to exceed its jurisdiction by improperly inserting itself in "well-established programs run by agencies of the U.S. Department of Transportation and state governments in cooperation with rail carriers." Instead, Mayo Clinic is merely asking the Board to advance the timetable for the conditions that it has already recognized would be needed if and

⁵ Applicants have also sought to discredit Mayo Clinic's safety concerns by reference to the FRA's action in terminating the DME Safety Compliance Agreement that FRA established in order to force DME to address the glaring deficiencies in its compliance with FRA and DOT safety and security regulations. Although it is true that FRA has recently relieved DME "from complying with the specific obligations of the agreement that are in addition to Federal regulatory requirements," FRA pointedly noted that "[c]ertain concerns about DME track, however, still remain. These concerns will be communicated later to DME at a scheduled meeting between FRA officials and officials from DME." Letter to Kevin V. Schieffer from Joseph H. Boardman, dated February 15, 2008 (Appendix J-1, Applicants' Reply Appendix). Mayo Clinic has no knowledge whether such a meeting has taken place.

when the PRB movements occur. That request does not interfere with FRA and FHWA and the programs they administer, but instead asks the Board to exercise its well established authority to impose conditions that the Board deems appropriate.

As the Board duly noted in Decision No. 9, served April 3, 2008.

Safety was a paramount concern in the environmental analysis in DM&E PRB Construction, and 24 of the environmental conditions imposed by the Board in that case will adequately address the potential safety concerns raised during the EIS process if DM&E decides to build into the PRB

That same rationale should be followed in this case. What was true in the context of the PRB construction proceeding for the increased transportation of coal is equally valid in the instant proceeding for the increased transportation of hazardous materials. Unfortunately, the conditions imposed in the *Construction* proceeding, which were not contested by DM&E before the Court of Appeals, *will not do anyone any good if CP decides it would not be rational to build into the PRB*. As a result, if the Board fails to impose appropriate safety conditions in this proceeding, Mayo Clinic will be faced with a potentially dangerous situation (albeit unrelated to the movement of coal) without having the benefit of any conditions that would address, at least in part, the very real safety concerns associated with the increased shipments of ethanol and other hazardous materials that are being raised herein. It is irrational to conclude that the increased transportation of coal merits safety conditions but the increased transportation of hazardous materials does not.

Applicants' attempt to convince the Board that it should not interfere with FRA and FHWA by imposing the reasonable safety conditions that are sought by Mayo Clinic cannot be squared with the Board's reasoning expressed in its recent decision in *Railroad Ventures, Inc. — Abandonment Exemption—Between Youngstown, OH, and Darlington, PA, in Mahoning and Columbiana Counties, OH, and Beaver County, PA*, STB Docket No. AB-556 (Sub-No. 2X), at

8-11 (STB April 28, 2008) (“*RVT*”). As the Board pointedly observed (slip op. at 8), it has its *own* authority “regarding the safety of railroads.” The Board also stressed that “Congress established railroad safety as an important policy for the Board to consider in exercising its regulatory responsibilities over the interstate railroad network.” *Id* As summarized by the Board, “in the Rail Transportation Policy, 49 U.S.C. 10101, Congress has directed the Board, among other things, ‘(3) to promote a safe and efficient rail transportation system . . .; (8) to operate transportation facilities and equipment without detriment to the public health and safety, and (9) to encourage honest and efficient management of railroads.”

Plainly, if the Board were to determine that the record reflects a need to impose conditions to protect Mayo Clinic from a potential catastrophic injury, then the Board has jurisdiction to do so. As the Board recognized in *Railroad Ventures*, *id* at 8-9

Congress has vested aspects of national rail oversight in four different federal agencies: the Board (with broad general jurisdiction over railroad activities conducted over the interstate railroad network), FRA (with primary jurisdiction over rail safety matters), FHWA (with authority to set safety standards for rail-highway crossings and warning devices); and the Department of Homeland Security (for national security matters).

In any event, Mayo Clinic is not seeking to have the Board involve itself with the technical questions regarding railroad safety or the construction of safety devices at railroad-highway crossings. Instead, Mayo Clinic is trying to ensure that its patients and employees are not subjected to unnecessary harms that could be mitigated, at least in part, by appropriate highway-rail grade crossing warning systems and wayside detectors. As a matter of common sense, it would seem that the Applicants would employ a reasonable cost-benefit analysis that would anticipate that it would be far less expensive to address Mayo Clinic’s safety concerns at this time, rather than have to deal with the financial consequences of not having taken adequate steps to ensure the safety of Mayo Clinic

The safety conditions sought by Mayo Clinic, particularly the request for crossing protections and wayside detectors to the east and west of Rochester, are not unreasonable given the close proximity of the tracks to Mayo Clinic. Nor would they be prohibitively expensive. As has been confirmed in the ongoing eminent domain proceedings in the U.S. District Court in Wyoming, DM&E is currently spending between \$3.5 million and \$4 million of CP's funds on engineering designs for the potential PRB construction.⁶ If CP can afford to be spending between \$3.5 million and \$4 million per month on development plans for the extension of the DM&E's line,⁷ even though it has claimed it has yet to make a decision about whether it is going to build into the PRB, CP can afford the much smaller cost of installing wayside detectors to the east and west of Rochester. Of course, if CP were to decide to build into the PRB and if the project were somehow to be financially successful, then CP would be required by the conditions the Board previously imposed as part of the *PRB Construction* cases to comply with the very conditions that Applicants recognize "overlap" with the conditions requested at this time in this proceeding. In essence, the issue should be framed in terms of what is lost by acting now? The obvious answer is "nothing". What is to be gained? Once again the answer is obvious, the increased safety of the patients and staff at Mayo Clinic.

4. Immediate Compliance With The Terms And Conditions of AAR Circular OT-55 Is Warranted Given The Unique Situation Involved With Mayo Clinic's Close Proximity To The Tracks.

Applicants shortsightedly claim (Response at 81) that Mayo Clinic's "third requested condition, the installation of wayside detectors east and west of Rochester, is inconsistent with the terms and conditions of AAR Circular OT-55 ("OT-55")". As is the case with the notification

⁶ See Attachment A hereto

⁷ According to sworn testimony before the United States District Court For the District of Wyoming in *Dakota, Minnesota & Eastern Railroad Corporation, et al v 399 591 Acres of Land, More or Less, Located in Campbell and Weston County, State of Wyoming*, CP, there are from 150 to 200 people working on design of the railroad project, equating to 25,000 to 30,000 hours per month. See Attachment A hereto

requirement imposed by PHMSA in its recent rule making proceeding involving enhancement of rail transportation safety and security for hazardous materials shipments, the proposed condition simply builds on operating practices that the rail industry has already implemented. As a major railroad that emphasizes safety, CP should recognize that the immediate installation of wayside defective wheel bearing detectors would be a prudent investment as it would reduce the risk of a catastrophic incident in the vicinity of Mayo Clinic.

Applicants acknowledge that “certain ‘key route’ requirements of OT-55 – including the placement of wayside detectors every 40 miles – are triggered by movement over a track segment of 10,000 carloads of hazardous materials or 4000 carloads of PIH (TIH) commodities.” Moreover, Applicants concede (Response at 82) that, if “the volume of hazardous materials Applicants move through Rochester reaches the key route threshold prescribed by OT-55,” they would comply with the terms and conditions of AAR Circular OT-55.

That cavalier perspective, which would delay implementation of protective measures until absolutely required by OT-55, cannot be squared with PHMSA’s recent statement that “[a] primary safety and security concern related to the rail transportation of hazardous materials is the prevention of catastrophic release or explosion in proximity to densely populated areas, including urban areas and events or venues with large numbers of people in attendance.”

Hazardous Materials Enhancing Rail Transportation Safety and Security for Hazardous Materials Shipments, *supra*, 73 Fed. Reg. at 20752. Nor can it be squared with PHMSA’s underlying mandate that it require rail carriers to analyze safety and security risks for “high-consequence targets,” such as Mayo Clinic, that are “along or in proximity” to a railroad’s track.⁸ *Id.* at 20755.

⁸ A “high consequence target” is defined to mean “a property, natural resource, location, area, or other target designated by the Secretary of Homeland Security that is a viable target of national significance for which an attach

In the final analysis, there is no good reason why the newly revealed projections regarding anticipated movements of ethanol over the Rochester line would not warrant the immediate placement of wayside detectors even though the 10,000 figure may not be immediately realized. With all due respect, Applicants seemingly have once again ignored the obvious safety benefits that would follow from taking a conservative approach that would recognize the unique situation that they and Mayo Clinic face as a result of the projected movement of thousands of carloads of ethanol on an annual basis through Rochester. What possible harm could follow the imposition of a condition that would require, as a conservative precaution, the placement of wayside detectors to the east and west of Rochester that might prevent a catastrophic incident? Or stated in slightly different terms, the cost of installing a couple of wayside detectors at this time would be insignificant when compared with the cost of responding to the potential devastation that would accompany a conflagration triggered by the rupture of carloads of ethanol or anhydrous ammonia as a result of a derailment in the immediate vicinity of Mayo Clinic. In terms of risk analysis, Applicants' apparent unwillingness to do anything more than the minimum required by OT-55 is incomprehensible and scarcely consistent with the protestation that they "are sensitive to the railroad safety issues raised by Mayo." (Response at 74).

While acknowledging that it "is nearly identical to Condition 122 imposed in the *DM&E PRB Construction* case, Applicants claim that Mayo's requested condition that CP's upper management meet with Mayo representatives to discuss how to best "minimize project-related impacts on the Clinic" is unnecessary. (Applicants' Response at 80). At the same time, they state (*id.*) that "[i]f and when Applicants decide to construct the PRB line, they will abide by that by railroad could result in catastrophic loss of life, significant damage to national security or defense capabilities, or national economic harm." Although Mayo Clinic has not yet been so designated, it plainly fits the definition of a "high consequence target."

condition ” Simply put, if CP is willing to comply with the requested condition at some unknown date in the future, what is to be lost by the imposition of a “nearly identical” condition at the present time? Plainly, the imposition of a condition that would require CP to engage in discussions that would hopefully relieve some of Mayo Clinic’s safety concerns is consistent with the Board’s oft-stated comment that it encourages negotiated settlements of disputes As was observed at pages 16 - 17 in Mayo Clinic’s “Argument and Requests for Conditions” (Mayo Clinic -3):

there is nothing about how DM&E plans to work with communities to *prevent* accidents. There is a noticeable absence of any discussion of crossing improvements or the construction of overpasses and underpasses that will be needed as traffic levels increase (in particular increased movements of hazardous materials) following the proposed transaction. There is no discussion of how to prevent catastrophic accidents from occurring in locations where the threat does not currently exist The SIP only addresses the steps that will be taken after accidents do in fact occur Even the disaster responsive approach evidenced in the SIP fails to consider what happens when the accident itself cripples the ability of first responders like Mayo to act. Plainly, the Board should consider whether it should take steps now to prevent disasters rather than waiting for the inevitable disaster to occur.

Applicants’ also take issue with Mayo Clinic’s request that Applicants be required to establish a protocol with Rochester officials regarding the movement of hazardous materials Applicants’ Response at 85-87. It should be carefully noted that although DOT has disagreed with certain aspects of the Mayo Clinic’s request, it has made it crystal clear that “[t]he Department *does* agree with the Mayo Clinic that emergency preparedness training should be a priority in the Rochester area” and that it intends to work to modify the SIP in that regard. (DOT-4 at 6).

Furthermore, in announcing its revision of the Hazardous Materials Regulations applicable to the safe and secure transportation of hazardous materials transported in commerce

by rail, the PHMSA made it clear that it is committed to “working with railroads, and with communities and first responders, to strengthen their capabilities and reduce the risks associated with hazardous materials transportation.” 73 Fed. Reg. at 20756-7 Most importantly, PHMSA noted its agreement that “local and regional governments require information on the types, quantities, and locations of hazardous materials transported through their jurisdictions to plan for effective and appropriate emergency response to incidents.” *Id.* at 20757. Indeed, PHMSA (*id.* at 20759) agreed that “state and local governments should have access to such information, provided access to the information is limited to those with a ‘need-to-know’ for transportation and security purposes ”

PHMSA further noted (*id.*) that “AAR Circular OT-55-I provides for disclosure of certain commodity flow data, upon request, to local emergency response agencies and planning groups ” Given Mayo Clinic’s status as the likely nerve center for any response to a catastrophic incident in Rochester involving hazardous materials transported by DM&E, it should be obvious that Mayo Clinic’s concerns are real and that those concerns should not be taken lightly even if OT-55 would not explicitly apply. A formal condition is, of course, a means to apply the OT-55 requirements even if the amount of hazardous materials being transported is less than the amount at which those standards would be mandatory. By imposing a condition, it would ensure that Mayo Clinic’s legitimate safety concerns will be addressed by CP’s top management, a matter that is wholly consistent with the public interest

Conclusion

For all the above-stated reasons, the Board is urged to carefully review the current state of the record and find that Mayo Clinic’s requested conditions are both timely and well justified. At the outset, the Board should find that DM&E’s ability to expand its services so as to transport

a significant increase in the number of carloads of hazardous materials through Rochester is directly related to the instant transaction. Without CP, DM&E would simply lack the financial ability to do so.

Second, if CP is not going to build into the PRB, the previously imposed conditions in the *DM&E Construction* case are meaningless and provide no future protection whatsoever. That being the case, the Board should recognize that the future transportation of thousands of carloads of hazardous materials immediately adjacent to one of the nation's premier medical facilities potentially jeopardizes the safety of thousands of patients and employees who work at Mayo Clinic. That will be true whether or not the track is upgraded to Class 3 status. Therefore, the Board should impose the safety conditions that Mayo Clinic has proposed to address the potential safety threats resulting from Applicants' projected increase in carloads of hazardous materials moving between Owatonna and Minnesota City that will occur even if the PRB extension is never built.

Respectfully submitted,

Mayo Clinic

C Dean McGrath, Jr. /s/

Richard H. Streeter /s/

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Date May 19, 2008

**Attachment A
Transcript Excerpts
Dakota, Minnesota & Eastern Railroad
Corporation v. 399.591 Acres of Land,
Case No. 2007-CV-142-WFD,
U.S. District Court for the District of
Wyoming**

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

DAKOTA, MINNESOTA & EASTERN)
RAILROAD CORPORATION; WYOMING)
DAKOTA PROPERTIES, INC.,)
)
Plaintiffs,)

VS.)

CASE NO. 2007-CV-142-WFD

399.591 ACRES OF LAND, MORE)
OR LESS, LOCATED IN CAMPBELL)
AND WESTON COUNTY, STATE OF)
WYOMING; LENARD D. SEELEY,)
TERESA J. SEELEY, JEFFERY D.)
SEELEY, DENISE SEELEY, as)
Joint Tenants; and BANK OF)
THE WEST, Trustee of the)
Harry Walker Keeline III)
Irrevocable Trust,)
)
Defendants.)

DAKOTA, MINNESOTA & EASTERN)
RAILROAD CORPORATION; WYOMING)
DAKOTA PROPERTIES, INC.,)

Plaintiffs,)

VS.)

CASE NO. 2007-CV-143-WFD

97.943 ACRES OF LAND, MORE)
OR LESS, LOCATED IN WESTON)
COUNTY, STATE OF WYOMING;)
JOSEPH D. SIMMONS and)
MICHELE D. SIMMONS,)
)
Defendants.)

DAKOTA, MINNESOTA & EASTERN)
RAILROAD CORPORATION; WYOMING)
DAKOTA PROPERTIES, INC.,)

Plaintiffs,)

VS.)

CASE NO. 2007-CV-144-WFD

1 46.271 ACRES OF LAND, MORE)
 2 OR LESS, LOCATED IN CAMPBELL)
 3 COUNTY, WYOMING; DANIEL E.)
 4 TRACY, trustee on behalf of)
 5 Daniel Eugene Tracy Revocable)
 6 Trust dated November 10,)
 7 2000; JOYCE A. TRACY, trustee)
 8 on behalf of Joyce Ann Tracy)
 9 Revocable Trust dated)
 10 November 10, 2000; TAMALA J.)
 11 TRACY; PRB RAIL, LLC,)
 12)
 13 Defendants.)
 14)
 15 -----)
 16 DAKOTA, MINNESOTA & EASTERN)
 17 RAILROAD CORPORATION; WYOMING)
 18 DAKOTA PROPERTIES, INC.,)
 19)
 20 Plaintiffs,)
 21)
 22 VS.)
 23)
 24 170.468 ACRES OF LAND, MORE)
 25 OR LESS, LOCATED IN WESTON)
 COUNTY, WYOMING; BRYAN STROH,)
 INC., a Colorado corporation;)
 FIRST NATIONAL BANK; 76.166)
 ACRES OF LAND, MORE OR LESS,)
 LOCATED IN WESTON COUNTY,)
 WYOMING; D&W LIVESTOCK, INC.,)
 a Wyoming corporation;)
 82.804 ACRES OF LAND, MORE OR)
 LESS, LOCATED IN CAMPBELL AND)
 CONVERSE COUNTIES, WYOMING;)
 JERRY AND BARBARA DILTS)
 FAMILY LIMITED PARTNERSHIP, a)
 Wyoming limited partnership;)
 BRIDLE BIT RANCH COMPANY,)
 a Wyoming corporation;)
 28.097 ACRES OF LAND, MORE)
 OR LESS, LOCATED IN CONVERSE)
 COUNTY, WYOMING; JERRY L.)
 DILTS, trustee on behalf of)
 Jerry J. Dilts Living Trust)
 dated March 11, 1997;)
 .088 ACRES OF LAND, MORE OR)
 LESS, LOCATED IN CONVERSE)
 COUNTY, WYOMING; 12.695 ACRES)
 OF LAND, MORE OR LESS,)

CASE NO. 2007-CV-145-WFD

1 LOCATED IN CONVERSE COUNTY,)
WYOMING; BARBARA H. DILTS,)
2 Trustee on behalf of Barbara)
H. Dilts Living Trust dated)
3 March 11, 1997; 9.526 ACRES)
OF LAND, MORE OR LESS,)
4 LOCATED IN WESTON COUNTY,)
WYOMING; DRY BEAVER, INC.,)
5 a Wyoming corporation;)
13.466 ACRES OF LAND, MORE)
6 OR LESS, LOCATED IN WESTON)
COUNTY, WYOMING; JACK A.)
7 GRIEVES; 69.818 ACRES OF)
LAND, MORE OR LESS, LOCATED)
8 IN NIOBRARA COUNTY, WYOMING;)
LONNIE L. HANZLIK; JUDY L.)
9 HANZLIK; 154.622 ACRES OF)
LAND, MORE OR LESS, LOCATED)
10 IN WESTON AND NIOBRARA)
COUNTIES, WYOMING; MICHAEL)
11 V. HARRIS; 49.983 ACRES OF)
LAND, MORE OR LESS, LOCATED)
12 IN NIOBRARA COUNTY, WYOMING;)
DOUGLAS WEAVER, conservator)
13 on behalf of Margaret I.)
Heine Conservator Estate;)
14 DUAINE HEINE; LISA JUDY,)
also known as Lisa Tanner;)
15 34.514 ACRES OF LAND, MORE)
OR LESS, LOCATED IN NIOBRARA)
16 COUNTY, WYOMING; GARLAND S.)
MARTIN; 11.761 ACRES OF LAND,)
17 MORE OR LESS, LOCATED IN)
WESTON COUNTY, WYOMING;)
18 DuWAYNE McGEE, also known as)
Duwayne A. McGee; 108.315)
19 ACRES OF LAND, MORE OR LESS,)
LOCATED IN NIOBRARA COUNTY,)
20 WYOMING; LEONARD A. SEDGWICK;)
ALICE ANN SEDGWICK; 70.387)
21 ACRES OF LAND, MORE OR LESS,)
LOCATED IN WESTON COUNTY,)
22 WYOMING; SAMUEL E. SEWELL,)
also known as Sammy E.)
23 Sewell; IRMA M. SEWELL;)
32.569-ACRES OF LAND, MORE)
24 OR LESS, LOCATED IN WESTON)
COUNTY, WYOMING; DONALD L.)
25 SIMMONS; WYOMING FARM LOAN)

4

1 BOARD, also known as Wyoming)
State Loan and Investment)
2 Board; SUNDANCE STATE BANK;)
112.659 ACRES OF LAND, MORE)
3 OR LESS, LOCATED IN NIOBRARA)
COUNTY, WYOMING; DIANE M.)
4 SIMON, tenant in common,)
subject to a contract for)
5 warranty deed with Mickey)
Simon and Diane Simon; SUSAN) March 18, 2008
6 SIMON, tenant in common,) Casper, Wyoming
subject to a contract for)
7 warranty deed with Mickey)
Simon and Diane Simon; CLAUDE)
8 D. SMITH, tenant in common,)
subject to a contract for)
9 warranty deed with Mickey)
Simon and Diane Simon;)
10 ANNETTE SMITH, tenant in)
common, subject to a contract)
11 for warranty deed with)
Mickey Simon and Diane Simon;)
12 PINNACLE BANK; FIRST NATIONAL)
BANK-NORTH PLATTE; GERRY)
13 GARR,)
14 Defendants.)

15
16 VOLUME 1
17 TRANSCRIPT OF HEARING ON CONDEMNATION
BEFORE THE HONORABLE WILLIAM F. DOWNES
CHIEF UNITED STATES DISTRICT JUDGE

18
19 APPEARANCES: (Page 1 of 2)
20 For the Plaintiff: Matthew J. Micheli
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22 Cheyenne, Wyoming 82003
23 RACHEL A. YATES
HOLLAND & HART
24 Suite 400
8390 East Crescent Parkway
25 Greenwood Village, CO 80111

1 APPEARANCES: (Page 2 of 2)

2 Also Present: Randy H. Henke
3 Vice President PRB Design &
4 Construction
5 DM&E and IC&E
6 140 North Phillips Avenue
7 Sioux Falls, SD 57104

8 For Defendants Seeley,
9 Stroh, D&W Livestock,
10 Dilts, Bridle Bit Ranch
11 Company, Dry Beaver,
12 Hanzlik, Harris, Martin,
13 McGee, Sedgwick, Sewell,
14 Donald Simmons:

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15 For Defendants Tracy:

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Darin Boyd Scheer
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17 For Defendants Joseph
18 and Michele Simmons,
19 Simon, Smith, Pinnacle
20 Bank, First National
21 Bank-North Platte:

Randall T. Cox
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Gillette, Wyoming 82716

22 Court Reporter:

Jamie L. Hendrich, CSR-RPR-CRR
Federal Official Court Reporter
23 U.S. District Courthouse
24 111; South Wolcott, Room 217
25 Casper, Wyoming 82601
(307) 265-5280

1 construct and operate.

2 Q. Has that been granted?

3 A. Yes, it has.

4 Q. Now, let me kind of focus in on the events since the
5 announcement of the merger. From your work on a day-to-day
6 basis, what can you see CP is doing with respect to the
7 Powder River Basin project?

8 A. CP is obviously -- the sale process was relatively
9 quick, and the "due diligence" period was relatively short.
10 They have since now -- we get asked a lot of questions, a
11 lot of information passed back and forth, so that they can
12 further understand all the intricacies of the project and
13 where we stand in getting those resolved so that we would be
14 ready to construct.

15 They also obviously are trying to understand our
16 computer systems and deciding how, assuming it's approved by
17 the STB, they can merge those systems or leave them stand
18 alone and how, assuming the STB would approve the merger,
19 they may or may not integrate our operations into the
20 overall system of the CP. So those are ongoing discussions,
21 but all our day-to-day operations are dictated by the DM&E.

22 Q. Have there been individuals identified by CP to be
23 liaisons with you all --

24 A. They have a --

25 Q. -- on the Powder River Basin project?

1 THE COURT: Good afternoon, counsel and parties.
2 Please be seated.

3 Mr. Henke, good afternoon, sir. I remind you again
4 of your oath.

5 THE WITNESS: Yes, sir.

6 THE COURT: All right. Counsel.

7 MS. YATES: Thank you.

8 BY MS. YATES:

9 Q. Before the lunch break, Mr. Henke, you had made some
10 reference to the design work that is ongoing through the
11 railroad project. How many people are working on that?

12 A. Presently we have in the range of 150 to 200 people
13 working on it daily. It has been higher at times.

14 Q. Is that full time?

15 A. Generally full time, at least 90 percent of the time.

16 Q. How many hours per month are you devoting to this PRB
17 project?

18 A. That equates to about 25,000 to 30,000 hours per month.

19 Q. Are there any engineering design problems that you've
20 encountered that would prevent this project from coming to
21 fruition?

22 A. As of right now, we don't see any engineering obstacles
23 that can't be designed or there's a solution for.

24 Q. What type of issues have you encountered with respect to
25 the PRB?

1 A. Well, there's issues along the Cheyenne River where we
2 run close. There's issues with the Pierre shale. There's
3 issues with bridge design and criteria and other things, and
4 we have a -- I believe we have a solution for all those.

5 Q. How did you develop that solution?

6 A. Well, we have, as I said, 150 to 200 people working on
7 this on a daily basis, and I get daily/weekly reports on
8 issues, and we've been finding ways to solve the issues.

9 Q. You've said a couple times that there were delays; the
10 construction schedule was delayed. Can you give us a --
11 kind of a history of -- since your involvement, what were
12 the construction schedules you were aiming for and what were
13 the reasons for those delays?

14 A. When I started, the original objective was to try to
15 start construction in 2007. That's what we worked towards.
16 As you're aware, when the FRA loan was not approved, we
17 slowed the project down at that time but only briefly for
18 about 30 days and rescheduled the project to build in 2008
19 which we worked to till about November or December of last
20 year when it became apparent we weren't gonna be able to
21 build in 2008, and we're now working for a very early 2009
22 start of construction.

23 Q. Is that construction start date something that you've
24 made known to CP?

25 A. It's well known.

1 that we made the first application, and that was to the FRA.
2 The FRA loan was obviously the best deal in town; and if you
3 could get that loan, that would have been the best way to
4 finance the project. So the financing started in earnest
5 shortly after -- and, again, there was some risk involved
6 there because the FRA decision in February had been remanded
7 to the Eighth Circuit Court --

8 Q. Or appealed to the --

9 A. -- appealed to the Eighth Circuit Court -- excuse me --
10 and -- but at that time our board agreed that we could go
11 ahead but wouldn't obviously be able to sign an agreement
12 till the Eighth Circuit Court appeal had been exhausted. So
13 the earliest the decision on financing could have been would
14 have been after the Eighth Circuit Court appeal. So once
15 the FRA loan got denied, we then looked for alternate ways
16 of financing, and what our board decided to do was to go out
17 in the market, and that's what led to the CP deal. So in
18 essence we've been -- we've been seeking financing now for
19 approximately two years on this project.

20 Q. And I directed you to Exhibit 308. What is that?

21 A. This is a letter to Kevin Schieffer from Joe Boardman of
22 the Federal Railroad Administration.

23 Q. And what is the purpose of this letter?

24 A. This is the letter to tell us that they cannot give us
25 the loan --

1 problems?

2 A. Yes. Here we would materially alleviate rail capacity
3 problems in shipping coal out of the Powder River Basin.

4 Q. Okay. Now, there are other items 1 through 5 that
5 follow that on page 3. What are those?

6 A. It's the findings by the -- it's the criteria that the
7 secretary looked at as far as granting the loan.

8 Q. Okay. And of those five, which did the DM&E meet?

9 A. One, two, three and five, I think.

10 Q. What findings did the FRA make with respect to Items 2
11 and 3?

12 A. "Every project loan is justified by the present and
13 probable future demand for rail services and further find
14 that the applicant has given reasonable assurance that the
15 facilities or equipment to be acquired, rehabilitated and
16 further developed or established with the proceeds of the
17 obligation will be economically and efficiently utilized."

18 Q. And so you mentioned then that after the denial of this
19 FRA loan, you had gone out seeking other types of financing.
20 How does the agreement with CP affect the ability of DM&E to
21 secure financing for this project?

22 A. DM&E cannot secure financing for the project. It would
23 be through the CP.

24 Q. And I'm sorry. How does the relationship now with CP
25 affect the ability or the finance ability of the PRB

1 project?

2 A. Oh, well CP being a much larger company with a lot
3 bigger asset base would suggest that they have a better
4 borrowing power or financing power than the DM&E as a
5 stand-alone would have.

6 Q. And at this point, do you see any insurmountable hurdles
7 to securing the financing?

8 A. I'm not in their finance department. That's a decision
9 they'd have to make at some point, but we'll have the
10 project ready to be built once they can secure the financing
11 which that's the best I can tell you.

12 THE COURT: You don't know.

13 THE WITNESS: I don't personally know what their
14 finance department is doing, no.

15 THE COURT: Did they communicate with you at all?

16 THE WITNESS: Not their finance department, no. I
17 deal primarily with their engineers and the people involved
18 in project development.

19 BY MS. YATES:

20 Q. I'd like to ask you apart from the -- well, let me focus
21 on land acquisition for just a minute. Is that something
22 that you deal with CP on?

23 A. All aspects of the project we deal with them on. They
24 have a complete land department in the organization, and
25 we've provided them with all the internal information we

1 figured out yet, but we're working on that. So I believe
2 they need to go hand in hand so that you can have the
3 project completely developed because if you get to one point
4 and you have all this done and all this money spent but you
5 can't get the other, it makes no sense.

6 Q. How much money are you spending on a monthly basis
7 toward the development of the PRB project?

8 A. Right now our budget is between 3-1/2 and 4 million a
9 month.

10 Q. Is that a budget of which you've advised CP?

11 A. Yes. They're well aware of it.

12 Q. And have they indicated that you should not spend that
13 budget?

14 MR. GIFFORD: Objection. Hearsay.

15 THE COURT: Sustained.

16 What percentage of that budget is spent on
17 engineering and design?

18 THE WITNESS: Well, of the -- call it 3.7 million,
19 split the difference. Obviously we have lawyers, and we
20 have other people but --

21 THE COURT: Taking out the lawyers.

22 THE WITNESS: -- engineering design is probably 90
23 percent of that, is on engineering or permitting or
24 something related to completing the design.

25 BY MS. YATES:

1 always look at it as a whole 'cause you can't build half
2 that route and not the whole route.

3 THE COURT: So 40 percent of what, 40 percent of
4 the 49 million?

5 THE WITNESS: Forty percent of the 25 is spent
6 strictly in Wyoming, roughly.

7 THE COURT: Okay.

8 THE WITNESS: That's a very rough number,
9 Your Honor.

10 BY MS. YATES:

11 Q. How much are you projecting to spend in 2008?

12 A. Projected right now is about 43 million, but we have a
13 proposal to ramp that up in the summer of this year which
14 would take it as high as 50 -- possibly as high as 55
15 million.

16 Q. To keep it on track for a 2009 --

17 A. Yes.

18 Q. -- schedule? And is -- have you advised CP of that
19 intention to spend that amount?

20 A. CP is well aware of our budgets we're going through and
21 what we're proposing to spend on the project, yes.

22 Q. Do you face any hurdles at this point from CP or
23 otherwise in satisfying the development work to stay on that
24 2009 schedule?

25 MR. GIFFORD: Objection. Foundation.

1 THE COURT: Overruled.

2 A. Can I answer?

3 BY MS. YATES:

4 Q. Go ahead.

5 A. No. We are charged with getting this project ready to
6 be built in early 2009. Obviously as with -- in any company
7 I have to justify my costs, and I have to run them through
8 my boss, through the trustee, and justify those costs. And
9 we are still working on a final budget for the full year;
10 but as of right now, we're spending at a rate of about
11 3-1/2 to 4 million a month.

12 Q. And have you received any instruction from CP with
13 respect to continuing that development?

14 MR. GIFFORD: Objection. Hearsay.

15 THE COURT: You can answer "yes" or "no," sir.

16 A. No.

17 BY MS. YATES:

18 Q. Kind of setting aside the findings that were contained
19 within numerous STB decisions and the Forest Service
20 decisions and the FRA loan, describe what benefits and need
21 are associated with this PRB project.

22 A. Well, I think we've touched on a lot of them already.
23 There's obviously the Clean Air Act which was talked about
24 earlier. There's the national energy policy that was talked
25 about earlier. There's the capacity issues in the Powder

1 A. There's 33 private landowners. "Landowners," that's not
2 necessarily parcels. And then there's the mine parcels.
3 There's Wyoming Forest Service parcels, et cetera. So
4 there's -- I can't tell you the exact number of parcels.

5 Q. And to date you've acquired one. Is that correct?

6 A. One private.

7 Q. Finally, I wanna ask you specifically about your
8 understanding. Do you anticipate that the CP merger will be
9 approved?

10 A. That's up to the STB. That's not my decision.

11 Q. Assuming that it is approved, would you agree with me,
12 Mr. Henke, that the decision to build this project is in the
13 sole discretion of Canadian Pacific?

14 A. If the STB approves the merger of the -- the two
15 companies without any unusual conditions, they will have the
16 right to decide whether to build this or not.

17 Q. Is that a "yes?"

18 A. If there's no unusual conditions in the STB final order,
19 I believe they'll have the right to build it, yes.

20 Q. "They" being Canadian Pacific?

21 A. "They" being Canadian Pacific Railroad.

22 MR. DALY: Your Honor, we have no further questions
23 for this witness.

24 THE COURT: So the Canadian Pacific has granted you
25 permission to spend, what, around 25 million dollars over

1 THE WITNESS: Yes.

2 THE COURT: All right. So Mr. Gifford is right
3 about one thing: If that flow of money had gone out, most
4 of the money for '07 would have been expended by the time
5 the merger was announced.

6 THE WITNESS: Nine-twelfths of --

7 THE COURT: Sure.

8 THE WITNESS: -- 47 million.

9 THE COURT: Okay. Now, going forward from there,
10 is it your testimony that the current spending is based on
11 what CP has approved you to do going forward? In other
12 words, the trustee has signed off on your current spending
13 plan for this new development?

14 THE WITNESS: I don't have an actual signed-off
15 budget for the full year. We are spending at 4 million --
16 3-1/2 to 4 million a month; and, yes, that is approved by
17 the trustee until we have a final budget.

18 THE COURT: And what is the reason for delaying the
19 final budget? We're well into the new fiscal year. Why the
20 delay?

21 THE WITNESS: Because we've been asking for some
22 additional funding from the trustee, and he has not -- we
23 have not given him a justification to approve it yet. So
24 it's a -- it's not a signed-off final budget.

25 THE COURT: So he's doling out money on a

1 you've testified to about communications with your potential
2 customers. How are you attempting to determine what your
3 market rates will be -- I'm sorry -- not market rates, your
4 market share will be.

5 A. Well, I mean, we've had a number of consultant studies
6 that have been done in the past, and what essentially we did
7 is in 2005 we shoved most of those aside and said, "Look, we
8 just need to get out and put a reality check to this thing
9 ourselves."

10 So really everything that's been developed since
11 that time is more of a living, breathing model based on us
12 meeting with the customers. And ultimately this whole thing
13 is about rolling up the sleeves and seeing if you can make
14 the transportation from Point A to Point B work and work
15 with connecting carriers and barge lines and vessels. And I
16 mean, that's what we've done, and that's what I've
17 undertaken largely in the last couple years, is studying
18 each one of those routes and seeing if we can build a market
19 share and get to these plants.

20 Q. Would --

21 THE COURT: Mr. Brooks -- excuse me, counsel.

22 I'm looking at the transcript which is being
23 transcribed for me instantaneously, and I'm looking at your
24 testimony, and there's a little bit of confusion here. You
25 said: "In terms of the startup" -- you were asked: "So in

1 THE COURT: Any other questions? Redirect?

2 REDIRECT EXAMINATION

3 BY MS. YATES:

4 Q. With respect to the term sheets that you have in front
5 of you, Exhibit 12 --

6 A. Yes.

7 Q. -- when you made reference to certain volume
8 commitments, what do the term sheets spell out in terms of
9 the volume commitments?

10 A. Ninety-five percent of the PRB coal requirements but not
11 less than two and a quarter million tons per year.

12 Q. And is that true for each one or is that the combined
13 total of the two?

14 A. That's true for each one.

15 Q. Okay. There was a question to you about the STB
16 application and the economic modeling that had gone into
17 that original 1998 application. What work, if any, have you
18 done since 1998 -- has DM&E done since '98 in order to
19 update those economic projections?

20 A. Well, I think I talked about this before, but we --
21 we've hired two or three consultants along the way to, you
22 know, look at that, provide their opinion of the market. We
23 then went and kind of shoved that aside and said, "Look,
24 we've got to go get our own reality check," and that's where
25 I really stepped into this and then went out and just put,

1 you know, real marketing and sales work into what these
2 consultants had put forth to build our own living, breathing
3 model, one that we're changing, you know, daily if we have
4 to, adding plants, taking plants out, you know, depending on
5 coal -- the trends on coal rates or the -- when a contract
6 might be rolling over. So we've taken that analysis and
7 really just tried to bring it down to the nuts and bolts of
8 providing real transportation to these customers.

9 Q. You had provided some testimony about the number of
10 million tons that is being consumed of PRB coal and 217
11 million tons and then projections and 40 plants; and I
12 confess even though I supposedly know the questions and the
13 answers, I was a little lost. What does the 217 million
14 tons represent?

15 A. That represents -- of our target market, that represents
16 the PRB tonnage that those customers burned in 2006. And
17 then what we do is we've got those plants all listed out,
18 and then we project that forward to, you know, when we're
19 gonna actually be in the market. And we add tonnage. We
20 take tonnage away to that 217 million tons and it grows.

21 Q. And so as of 2 -- 2012 at the start-up, where is that
22 number?

23 A. We project that at 260 million tons.

24 Q. Now, are -- is that only accounting for plants that are
25 currently burning PRB coal?

1 Q. "And do you agree with the statement that CP has not yet
2 made a decision about whether it will build out into the
3 Powder or not?

4 A. "In terms of a final decision to commit to construction,
5 I would say most definitely they haven't."

6 MR. GIFFORD: Go to page 235, line 6.

7 Q. "You don't dispute that CP will be the sole
8 decision-maker about whether to build this project or not,
9 correct?

10 A. "At the end of the regulatory proceedings sometime next
11 year?

12 Q. "Correct.

13 A. "That's correct.

14 Q. "And you don't dispute that CP has not made a decision
15 as we sit here today about whether to build out into the
16 Powder or not?

17 A. "I think they clearly have decided to pursue the
18 project. That's why we're continuing with the development
19 effort. I distinguished the development effort from the
20 construction effort. And if you understand that
21 distinction, that's as clear as I think I can make it. But
22 this is for me speaking for CP. You're asking about my
23 opinion. That's a -- really a question for CP."

24 MR. GIFFORD: Go to page 238, line 20.

25 Q. "Is it fair to say that the financial success of the

1 then it should do that and move forward."

2 MR. MICHELI: Page 184 (sic), line 16.

3 Q. "You go down here a few lines to say 'CPR participation
4 in the PRB project development adds major balance sheet
5 credibility and greatly expanded resources to this vital
6 project.' But there is no CPR participation in the project
7 at this time, is there?" (sic)

8 MS. SVEC: I don't have that page. 184?

9 MR. MICHELI: 148, 148.

10 MS. SVEC: Okay.

11 MR. MICHELI: Line 16.

12 MS. SVEC: Okay.

13 A. "Of course there is.

14 Q. "Well, they've agreed to purchase DM&E, but they're not
15 participating in the project.

16 A. "Of course they are.

17 Q. "How?

18 A. "Well, as owners of the company.

19 Q. "Well, they're not owners yet.

20 A. "Yes, they are.

21 Q. "The trustee is the owner.

22 A. "No, they are owners of the companies.

23 Q. "Okay. Are they funding? Are they sending you money to
24 do stuff?

25 A. "As owners of the company, it is their money that is

1 being spent on it. Absolutely. This isn't the trustee's
2 money. The trustee is holding everything -- he's got
3 obligation to DM&E and to CP as the owner. But I'm using CP
4 in a generic example as I would use DM&E in a generic
5 example of all of the affiliates."

6 MR. MICHELI: There's one more line in that answer.

7 MS. SVEC: Oh, I'm sorry.

8 A. "Yeah. CP is very involved in it."

9 MR. MICHELI: Page 151, line 11.

10 Q. "Okay. So question to you was: I asked you, there is
11 no CPR participation in the PRB project at this time. And
12 your answer was: Well, we're spending DM&E money that
13 otherwise might go to CPR later, right?

14 A. "My answer was unequivocally that it's not correct. CP
15 is involved in it, period."

16 MR. MICHELI: Page 233, line 25.

17 Q. "And do you agree with the statement that CP has not yet
18 made a decision about whether it will build into the Powder
19 or not? (sic)

20 A. "In terms of a final decision to commit construction, I
21 would say most definitely they haven't."

22 MR. MICHELI: Let's skip to line 11 on page 234.

23 Q. "I'm not sure what you were talking about in your
24 answer. You said in terms of a final decision to construct,
25 no. But it left the possibility there may have been other

1 decisions by CP. I'm just trying to clarify.

2 A. "Oh, certainly. Goes back to what I was talking about
3 this morning. In terms of the ongoing development and so
4 forth, we're going full steam ahead on that. And if they
5 weren't planning on or having an expectation or an
6 assumption that the PRB was going to happen, it would be
7 foolish to consider or advance development efforts. So that
8 would be something that would fit in that category. It's a
9 developmental -- it's a development budget versus a
10 construction point of no return kind of decision, commitment
11 of the entire construction amount if that helps you."

12 MR. MICHELI: And that's all, Your Honor.

13 THE COURT: Thank you.

14 All right. We're now ready for Mr. Nelson. Is
15 that right?

16 MR. SCHEER: Yes, Your Honor.

17 THE COURT: All right.

18 MR. SCHEER: The defendants call Mike Nelson.

19 THE CLERK: Please raise your right hand.

20 (Witness complies.)

21 MICHAEL NELSON,

22 called as a witness herein on behalf of the defendants,
23 having been first duly sworn by the deputy clerk, testifies
24 as follows:

25 THE CLERK: Please take the witness stand.

Certificate of Service

I, Richard H. Streeter, do hereby certify that a true copy of the Public Version of the foregoing Rebuttal in Support of Request for Conditions and Other Opposition was served this 19th day of May, 2008, by first-class mail, postage prepaid, on all Parties of Record

Richard H. Streeter /s/
Richard H Streeter